49846-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DAVID A MORTON,

Appellant

v.

JP MORGAN CHASE BANK NA.,

Respondents

BRIEF OF APPELLANTS

Appeal from Pierce County Superior Court
Case No: 14-2-07014-0
The Honorable Judge Chushcoff

/s/ Jason E Anderson
Jason E Anderson, WSBA 32232
Law Office of Jason E. Anderson
5355 Tallman Ave NW Ste 207
Seattle, WA 98107
(206) 706-2882
Jason@jasonandersonlaw.com
Attorney for Defendant/
Appellants.

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I. INTRODUCTION

This appeal is about a simple issue. Can a Plaintiff obtain an order for Summary Judgment for Judicial Foreclosure based on a claim to enforce a lost note under RCW 62A.3-309, when there is an issue of material fact as to whether the Plaintiff ever obtained possession of that note before it was allegedly lost? A secondary issue is whether a trial court can issue an order for summary judgment and decree of foreclosure under RCW 62A.3-309 without entering findings as to whether the defendant is adequately protected if a third party appears with the lost note.

The Appellant, David Morton, obtained a loan from Franklin Financial on or about May 15, 2000. [CP 81-3.] This loan was secured by a note and deed of trust endorsed in favor of Franklin Financial. [CP 81-3.]

JPMorgan Chase Bank NA, (hereinafter "Chase") filed a lawsuit in Pierce County Superior Court seeking a judgment and decree for judicial foreclosure to foreclose on the note and deed of trust granted to Franklin Financial. [CP 1-32.] Chase sought this relief based on a declaration stating that it was unable to produce the note in question because it was lost or destroyed. [CP 58-9.] However, Chase never provided evidence that it received the note in question prior to losing the note.

David Morton objected to the evidence provided by Respondent. [CP 75-76.] Under these circumstances, this court should have denied the motion for summary judgment because there was an unresolved issue of material fact - namely whether Chase had ever received the note before it claims that it lost the note. The Court further erred when it denied the Respondent's motion for reconsideration of the Summary Judgment Order. There are some secondary errors outlined below that also warrant reversal.

II. ASSIGNMENTS OF ERROR

A. The Appellant asserts the following assignments of error:

1. The trial court erred when it granted an order for summary judgment when after construing all inferences in favor of Appellant, there was a genuine issue of material fact whether the note Respondent sought to enforce was ever transferred to Respondent.

2. The trial court erred when it denied the Defendant's request for a continuance so it could conduct some discovery.

3. The trial court erred when it denied the Appellant's motion for reconsideration of the summary judgment order.

B. Issues Pertaining to Assignments of Error:

1. When a Plaintiff seeks to enforce a lost note Under RCW 62A.3-309, does it have to prove that it had possession of the note in question? Assignment of Error 1.

2. When a Plaintiff seeks to enforce a lost note that has been endorsed in blank, does it have to prove it had possession of the note to seek to enforce the note? Assignment of Error 1.

3. If the copy of the note produced by the Plaintiff show that it was a copy generated by a third party, does that fact support an inference that Plaintiff never obtained possession of the original note? Assignment of Error 1.

4. If a reasonable inference can be drawn that the Plaintiff never obtained possession of the note is seeks to enforce, does a material factual dispute exists that precludes entry of a judgment for summary judgment. Assignment of Error 1.

5. When analyzing declarations and affidavits provided in support of a motion for summary judgment, do the declarations and affidavits have to comply with the rules of evidence? Specifically, if a declaration or affidavit consists of hearsay evidence, is the evidence excludable if an exception to the hearsay rule does not apply? Assignment of Error 1.

6. When a trial court enters a summary judgment order under RCW 62A.3-309, does the court have to enter findings establishing that the

defendant is adequately protected against loss if another person appears with the note in question? If so, does the trial court's failure to enter such findings if any, require reversal of the summary judgment order? Assignment of Error 1.

7. If a defendant provides a declaration of counsel indicating (a) that counsel had just appeared in a case where defendant had been pro se, (b) counsel identified specific discovery he was seeking related to the facts identified in a motion for summary judgment must the trial court judge continue the hearing to allow counsel to pursue that discovery? Did the trial court err when it denied the defendant's motion for a continuance of the summary judgment hearing? Assignment of Error 2.

8. If upon a motion for reconsideration, the trial court judge determines that its prior decision was based on an error of law or of the evidence, is the trial court judge required to reconsider his decision? Assignment of Error 3.

III. STATEMENT OF THE CASE

A. Franklin Financial LLC Obtains Note and Deed of Trust from David Morton.

David Arthur Morton entered into a loan to purchase property commonly known as 3901 Northshore Blvd NE, Tacoma, WA 98422. [CP 81-3, *Declaration of David Morton*.] Mr. Morton hired a mortgage broker

for assistance in obtaining this loan. [CP 81-3.] The mortgage broker told Mr. Morton that it had a loan ready with an interest rate of 6.5%. [CP 81-3.] Mr. Morton was in a situation where he had to complete the refinance on shortened time. [CP 81-3.] When Mr. Morton signed the loan documents at the escrow office, the loan terms were changed to 9.8375%. [CP 81-3.] At this point it was too late for Mr. Morton to back out of the loan and signed the documents under duress. [CP 81-3.] Mr. Morton signed a note in favor of First Franklin secured be a deed of trust on his property (hereinafter "Morton Note").

B. <u>Chase Claims the Right to Foreclose Based on a Lost Note</u>.

Chase filed the present action seeking judicial foreclosure. [CP 1-32.] Chase filed a motion for summary judgment claiming it was entitled to Summary Judgment based on its alleged right to enforce the lost note made by Mr. Morton in favor of Franklin Financial. [CP 38-44.] Chase relied on an Affidavit from Douglas Theener which incorporated an Affidavit from Alex Laird in support of this motion. [CP 48-69.] The relevant evidence in this declaration included the following:

1. Douglas Theener declared that he made his declaration based on a review of business records of Chase. [CP 49, *Douglas Theener Declaration* ¶ 1.] This means he did not have personal knowledge of anything in his declaration.

2. The records Mr. Theener states he relied on were images of the Note and Mortgage and Chase's electronic servicing system. He Stated:

> 4.
>
> Chase's business records that relate to the Borrower's loan that I reviewed for the statements made in this Declaration are images of the Note and Mortgage and Chase's electronic servicing system. Attached hereto as **Exhibit A** is a printout containing the records from that system setting forth information concerning the Borrower's loan and the amounts due.

[CP 49. L 9-11].

3. Mr. Theener attached to the declaration three pages of screen shots which were presumably screenshots of the Chase servicing system which presumably reflects various calculations regarding the amount due on the loan as Exhibit A. [CP 52-54.]

4. Mr. Theener then attached a separate affidavit of Alex Laird. The pages of this affidavit were out of order since it begins with the image of a note [CP 55-57.] suggesting that the note was separately part of Mr. Theener's declaration. [CP 55-69.] However, the page numbers for Exhibit B indicate that the exhibit consists of Alex Laird's lost note declaration and the note and deed of trust attached to Alex Laird's declaration. [CP 48-69.]

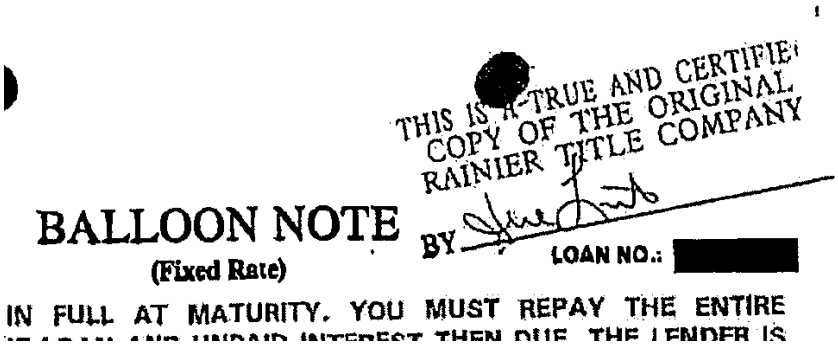
5. Alex Laird's Declaration contains the following information:

First, Mr. Laird declared that his knowledge consists of the

business records of Chase regarding the loan (Mr. Morten's loan). [CP 58-59, *Alex Laird Affidavit* ¶ 1.] Thus, his knowledge is solely limited to the records he reviews. Mr. Laird identifies two records he reviewed. The first record consisted of the following:

A Note (the "Note") dated 05/15/2000, in the original principle amount of $206,950.00 with an original interest rate of 9.830% per annum, providing for initial monthly payments in the amount of $1790.19. [CP 58.]

The second record is a Deed of Trust dated 05/15/2000 and recorded in the office of the County Auditor of Pierce County, WA in Book N/A at Page N/A or as Instrument no. 200005260101. [CP 58.] The top right hand corner of the Balloon Note contains a stamp indicating that the image is a copy of the original by Rainier Title Company. [CP 55.] This shows that Chase does not have a copy of the original note, but simply a copy of a copy.


THIS IS A TRUE AND CERTIFIED
COPY OF THE ORIGINAL
RAINIER TITLE COMPANY
BY

BALLOON NOTE
(Fixed Rate)

LOAN NO.: [redacted]

IN FULL AT MATURITY. YOU MUST REPAY THE ENTIRE

[CP 55.]

The fact that the only image of the note Chase has that it claims it lost is a copy of the note supports an inference that it never received the note.

Mr. Laird further states: the business records described above reflect that the Note was in JP Morgan Chase-Custody Services, Inc., possession at the time it was lost or destroyed. [CP 59, *Alex Laird Affidavit* ¶ 4.]

This evidence constitutes the universe of evidence presented by Chase in support of its allegation that it had physical possession of the Morton note before it claims it lost the note.

C. David A Morton Objected to the Hearsay Declarations.

The defendant, David A. Morton objected to consideration of the declarations of Douglas Theener and Alex Laird on the issue of whether Chase has received the Morton Note. [CP 71-80.] Specifically, the defendant argued in response to the motion for summary judgment:

> The declarations and affidavits submitted by Chase in support of its allegation that it held the Morton note are hearsay statements. Evidence Rule 802 provides that "Hearsay is not admissible except as provided by these rules" (other rules). . . .

[CP 75.]

The Defendant noted that the only conceivable exception to the Hearsay Rule was RCW 5.45.020 which allows certain business records to be produced as an exception to the hearsay rule. [CP 76.] The Defendant objected to the Declarations of Douglas Theener and Alex Laird because:

> In this case, none of the records provided by Chase in their declaration show that the Note was transferred to Chase.
>
> The Lost Note Affidavit refers to records that have never been produced to state that Chase had obtained and then lost the note. In absence of the actual records, the self serving statements in the Lost Note Affidavit are inadmissible.

[CP 76.]

D. **David Morton Objected to the Lack of any Security by Plaintiff.**

David Morton objected to the lack of any offer of security by Plaintiff in the event a third party later appeared with the lost note and sought to enforce it. [CP 6].

E**. David Morton Asked for a Continuance to Allow for Discovery.**

Counsel for David Morton appeared on October 24, 2016. [CP 70.] Counsel filed a declaration outlining discovery Mr. Morton needed to respond to the motion for summary judgment. [CP 84-5, *Declaration of Jason E. Anderson in Support of Response to Motion for Summary*

Judgment, p. 1-2.]

G. Court Enters Summary Judgment for Chase

The Court entered a judgment in favor of Chase on November 4, 2016. [CP 90-94.]

H. Court Denies Motion for Reconsideration.

David Morton filed a motion for reconsideration. [CP 95-103.] The court denied the motion for reconsideration. [CP 104-105.]

IV. Argument of Appellant.

1. The Trial Court Erred When It Entered an Order for Summary Judgment When There Was a Genuine Issue of Material Fact as to Whether Chase Had Ever Received the Morton Note Before it Claims it Lost It.

The court entered an order for summary judgment on November 4, 2016. This decision was made in error because the court first, improperly placed the burden of persuasion on the Defendant, David A. Morton before the Plaintiff had established a prima facie case for summary judgment, second, the court considered inadmissable evidence in deciding its motion for summary judgment, and third, the court failed to construe all reasonable inferences in favor of the defendant.

A. To Prevail at Summary Judgment, Chase Had To Establish

That There Was No Dispute of Material Fact That It Obtained the Morton Note and Then Lost the Note.

Chase claims that it is entitled to sue Mr. Morton because it is the holder of a lost note. To enforce a lost note, Chase must prove the elements set out under RCW 62A.3-309 which provides:

> (a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> (b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, RCW 62A.3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

(emphasis added)

There is no evidence in the copies of the note and deed of trust and computer images that establishes that Chase obtained a copy of the note before it claims it lost the note. Unsupported declarations that do not arise

from the business records presented are inadmissible.

B. Rules of Evidence Apply to Motions for Summary Judgment

It is a longstanding rule of Washington law that a declaration in support of summary judgment must be made on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the declarant is competent to testify to the matters stated. CR 56(e); *McKee v. Am. Home Prods., Corp*., 113 Wn.2d 701, 706 (1989). However, to preserve an objection to inadmissible evidence, a party must object to an affidavit. *Lamon v. McDonnell Dougas Corp*., 91 Wn.2d 345, 352 (1979). In this case, the defendant preserved his objection to the Douglas Theener and Alex Laird affidavits by objecting to them in his response to Chase's motion for summary judgment. [CP 75-76] Thus, this court may only consider the admissible portions of the declarations of Douglas Theener and Alex Laird.

C. The Evidence Chase Submitted is Limited to the Documents Attached to the Declarations and Affidavits.

The Washington Court of Appeals published an opinion in 2015 that directly addressed the evidentiary issues raised by Mr. Morton. *Podbeilancik v. LPP Mortgage LTD*, 191 Wn. App. 662, 362 P.3d 1287, 1289-90 (2015). In that decision, the court stated: "Podbeilancik did object

to the Stenman declaration in the trial court, and she repeats here her argument that the declaration is inadmissible because it testifies to the contents of business records not in evidence. . . We agree with Podbielancik." *Id*.

The only applicable exception to the hearsay rule that applies to the declarations in this case is the business records exception. This is the same exception the court in *Podbielancik* analyzed. The court at ¶12 stated:

> Business records are an exception to the hearsay rule and are admissible as evidence. See RCW 5.45.020. A custodian or other qualified witness may testify as to the contents and admissibility of a business record that is offered into evidence. *Id*. The business records exception does not permit affidavits testifying to the contents of documents that are not in the record. *Melville v. State*, 115 Wn.2s 34,36 (1990)(disallowing affidavit asserting facts learned from documents outside of the record).

The court in Podbielancik then held that testimony regarding documents that were not submitted with the declaration was inadmissible. *Id*. The same rule should apply in this case. Mr. Morton objected to the Chase declarations and affidavits. The only evidence in the declarations of Douglas Theener and Alex Laird that are admissible is that evidence contained in the exhibits attached to their declarations.

D. The Records Do Not Establish that Chase Ever Received the Note it Claims it Lost.

The declaration of Alex Laird is based solely on the copy of the note attached to his affidavit and the deed of trust attached to his declaration. [CP 58.] However, there is no indication in the note or deed of trust that the note in question was ever physically transferred to Chase. The statement of Alex Laird that Chase had possession of the note is simply not supported by the business records he references. If Chase had obtained the original note, it would have made an image of the original note, not an image of a copy of the note generated by Rainier Title. There is simply no admissible evidence that Chase obtained the original note before it claims it could not find the note.

E**. <u>Inferences Must be Construed in Favor of Mr. Morton.</u>**

When reviewing a motion for summary judgment, the court must construe all inferences in favor of the non-moving party. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Here are some of the inferences that must be construed in favor of Mr. Morton.

1. *The Note May Have Never Been Transferred from Franklin Financial to Chase*.

The fact that Chase cannot find the note after searching its records does not support an inference that it lost the note. A reasonable inference is that the note was never transferred to Chase and that is the reason they cannot find the note.

2. Servicing Records Do Not Mean Chase is the Holder of the Note.

The fact that Chase is servicing the Morton loan does not mean Chase is entitled to enforce the loan. Chase must either have possession of the note, or be an agent of the person who has possession of the note. There is no evidence of either set of facts in the Chase motion for summary judgment. A servicer may collect interest, principal and escrow payments from a borrower on behalf of a holder of a note without being the holder of the note. Thus, the fact that Chase has servicing records is not evidence that Chase has the right under Washington law to enforce the note.

F. Trial Court Erred When it Failed to Make Any Findings as to Whether Defendant Would be Adequately Protected.

The Summary Judgment Order and Decree of Foreclosure fail to provide any findings addressing the issue of whether David Morton would be adequately protected if a third party appeared having possession of the note that was purportedly lost. CP

G. Trial Court Erred When it Failed to Continue Hearing.

Mr. Morton filed a declaration of counsel indicating that counsel had just appeared in the case and that discovery was needed. This declaration complied with Washington Civil Rule 56(e). The trial court

erred when it denied this motion for a continuance.

H. Trial Court Erred When it Denied the Motion for Reconsideration.

The trial court erred when it denied Mr. Morton's motion for reconsideration pursuant to Washington Civil Rule 59(7) and (8). The motion for reconsideration was based on similar arguments to the motion for summary judgment so the Appellant will not repeat those arguments here.

VI. CONCLUSION

In conclusion, the court should reverse the order granting the motion for summary judgment and the order denying the motion for reconsideration.

August 14, 2017

_/s/ Jason E Anderson ___
Jason Anderson, WSBA # 32232
Attorney for Appellants
5355 Tallman Avenue NW #207
Seattle, WA 98107
(206) 706-2882
Jason@jasonandersonlaw.com

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I hereby certify that on this date I mailed, emailed, and/or faxed a copy of the document to which this is appended to the respondent, as follows;

Copies sent to:

Counsel for Plaintiff / Respondent JPMorgan Chase Bank NA Fred B. Burnside FredBurnside@dwt.com Hugh Robert McCullouh hughmccullough@dwt.com Frederick Alan Haist frederickhaist@dwt.com Julia A Phillips jphillips@aldridgepite.com	[x] e-service

Signed under penalty of perjury, under the laws of the State of Washington, at Seattle, Washington, on August 14, 2017.

/s/ Jason E Anderson
Jason Anderson, WSBA # 32232
Attorney for Appellants
5355 Tallman Avenue NW #207
Seattle, WA 98107
(206) 706-2882
Jason@jasonandersonlaw.com

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